The Facebook, Inc. v. Connectu, LLC et al Doc. 212

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THE FACEBOOK, INC. and MARK ZUCKERBERG,

Plaintiffs,

v.

CONNECTU, INC. (formerly known as CONNECTU, LLC), CAMERON WINKLEVOSS, TYLER WINKLEVOSS, DIVYA NARENDRA, PACIFIC NORTHWEST SOFTWARE, INC., WINSTON WILLIAMS, WAYNE CHANG, and DAVID GUCWA,

Defendants.

Case No. 5:07-CV-01389-RS

PUBLIC/REDACTED NOTICE OF MOTION, MOTION, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FACEBOOK'S MOTION TO COMPEL PACIFIC NORTHWEST SOFTWARE AND WINSTON WILLIAMS TO PROVIDE COMPLETE AND SUPPLEMENTAL RESPONSES TO FACEBOOK'S FIRST SET OF INTERROGATORIES NOS. 3 AND 4

Date: November 28, 2007
Time: 9:30 A.M.
Judge: Hon. Richard Seeborg

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NOTICE OF MOTION

TO DEFENDANTS PACIFIC NORTHWEST SOFTWARE AND WINSTON WILLIAMS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 28, 2007, at 9:30 A.M. or as soon thereafter as it may be heard, in Courtroom 4 of this Court, before the Honorable Richard Seeborg, Plaintiff Facebook, Inc., pursuant to Rules 37 and 45 of the Federal Rules of Civil Procedure, and N.D. Cal. Civil Local Rules 37-1 and 37-2, will and hereby does move for an order compelling Defendants Pacific Northwest Software ("PNS") and Winston Williams to provide responses without objection to Facebook, Inc.'s First Set of Interrogatories Nos. 3 and 4 to Defendants Pacific Northwest Software and Winston Williams. To the extent that PNS and Mr. Williams have refused even to answer Interrogatories Nos. 3 and 4 Facebook asks that such objections be over-ruled and both Defendants be ordered to respond completely. This motion is based on the accompanying Memorandum, the Declaration of Theresa A. Sutton, and all pleadings and papers which are of record and are on file in this case.

CERTIFICATION PURSUANT TO FED. R. CIV. P. 37(A)(2)(B) & N.D. CAL. CIV. L.R. 37-1(A)

Counsel for Facebook, Inc. hereby certifies pursuant to Fed. R. Civ. P. 37(a)(2)(B) and N.D. Cal. Civ. L.R. 37-1(a) that it has engaged in multiple conferences beginning June 29, 2007 with counsel for PNS and Winston Williams concerning Facebook's position that PNS and Mr. Williams respond completely and without objection to Interrogatories Nos. 3 and 4 set forth in Facebook's First Set of Interrogatories to Defendants PNS and Winston Williams. *See* Declaration of Theresa A. Sutton in Support of Motion to Compel ("Sutton Decl.") ¶10. However, despite the parties' good faith efforts to meet and confer on the subject, they were unable to resolve their differences with respect to the discovery at issue. *Id.*

I. INTRODUCTION

Despite deposition testimony that responsive information exists, Defendants Pacific Northwest Software and Winston Williams refuse to provide complete and accurate responses to Facebook's First Set of Interrogatories, Nos. 3 and 4. These interrogatories seek information that forms the crux of Plaintiffs' claims, including those based on the Federal CAN-SPAM Act, Computer Fraud and Abuse Act, and California Penal Code, namely Defendants' unauthorized access to Facebook's servers to harvest email addresses and use them to send unsolicited commercial emails. Despite straightforward questions, Defendants either refused completely to respond or provided evasive and incomplete answers. An order compelling Pacific Northwest Software and Winston Williams to supplement their responses to provide complete answers to Interrogatories Nos. 3 and 4 is warranted.

II. STATEMENT OF FACTS

A. General Background And Procedural History

In early 2005, Defendants Pacific Northwest Software and Winston Williams developed software applications, known as Social Butterfly and Importer, for ConnectU, the Winklevoss brothers, and Divya Narendra in order to hack into Facebook's servers, steal information (including email addresses) and spam Facebook users to invite them to join www.connectu.com. Plaintiffs allege in their Second Amended Complaint ("SAC") that these activities are in violation of the Computer Fraud and Abuse Act (18 U.S.C. § 1030), California Penal Code Section 502(c), and the Federal CAN-SPAM Act (15 U.S.C. §§ 7701, et seq.), among other laws. Dkt. No. 76.

On March 21, 2007, PNS and Mr. Williams filed a Motion to Dismiss the SAC, arguing the Court lacked jurisdiction over them. Dkt. No. 23. On May 23, 2007, the Court authorized Facebook to take limited jurisdictional discovery to enable Facebook to oppose PNS and Mr. Williams' motion. Dkt. No. 74. On May 24, 2007, Facebook propounded its First Set of Interrogatories to PNS and Mr. Williams. Sutton Decl., Exs. A and B. Although the interrogatories were intended to elicit information regarding jurisdictional issues, this Court acknowledged that the subject matter of the jurisdictional discovery may overlap with the substantive issues of this case. Id., Ex. C at 19:12-20:13. Both PNS and Mr. Williams responded to the First Set of Interrogatories on June 18, 2007. Sutton Decl., Exs. D and E.

B. Facebook's Interrogatories Seek Relevant Information

Facebook's First Set of Interrogatories for both Defendants are set forth below; Defendants' responses follow:

INTERROGATORY NO. 3:

IDENTIFY ALL Internet Protocol ("IP") Addresses and URLs that YOU used OR accessed to obtain any data from any website associated with Facebook, Inc. (including but not limited to the www.thefacebook.com and www.facebook.com), the purpose for the use or access, and ALL dates in which such URLs or IP addresses were accessed by YOU.

PNS RESPONSE TO INTERROGATORY NO. 3:

This interrogatory is unintelligible. It further assumes facts not in evidence. This interrogatory is compound and complex and comprises at least three separate interrogatories. The phrase "obtain any data from any website associated with Facebook, Inc." is vague and uncertain. Subject to these objections and the general objections and the objections to the definitions and instructions incorporated herein, Responding party answers as follows: Responding party has no knowledge that will enable it to answer this interrogatory. Responding party believes Winston Williams may have information regarding this interrogatory.

WINSTON WILLIAMS RESPONSE TO INTERROGATORY NO. 3:

This interrogatory is unintelligible. It further assumes facts not in evidence. This interrogatory is compound and complex and comprises at least three separate interrogatories. The phrase "obtain any data from any website associated with Facebook, Inc." is vague and uncertain. Subject to these objections and the general objections and the objections to the definitions and instructions incorporated herein, Responding party answers as follows: Responding party identifies the following Internet IP addresses that were used to obtain data from the facebook.com: 207.244.158.164, 207.244.158.165 and 207.244.158.34.

INTERROGATORY NO. 4:

IDENTIFY all instances (including dates) when YOU distributed email communications to email addresses obtained originally from FACEBOOK, including identification of ALL email addresses of PERSONS in California.

PNS RESPONSE TO INTERROGATORY NO. 4:

This interrogatory is unintelligible. It further assumes facts not in evidence. Subject to these objections and the general objections and the objections to the definitions and instructions incorporated

> herein, Responding party answers as follows: Responding party has no knowledge that will enable it to answer this interrogatory. Responding party believes Winston Williams may have information regarding this interrogatory.
>
> **WINSTON WILLIAMS RESPONSE TO INTERROGATORY NO. 4**:
>
> This interrogatory is vague, ambiguous, uncertain, and unintelligible. It further assumes facts not in evidence. Subject to these objections and the general objections and the objections to the definitions and instructions incorporated herein, Responding party answers as follows: ConnectU's website included a page which allowed its members, who were also members of thefacebook.com, to join ConnectU. When a ConnectU member, who was also a member of thefacbook.com wanted ConnectU to invite his or her thefacebook.com friends to join ConnectU, the ConnectU member would complete this page on the ConnectU website. By completing this page on the ConnectU website, the ConnectU member volunteered his or her access information from thefacebook.com to ConnectU and authorized ConnectU to use this access information to get his or her friends' email addresses found on the facebook.com, and invite them to join ConnectU. Responding party cannot identify specific dates this activity occurred.

Mr. Williams appeared for deposition days after he served his responses. In his deposition, Mr. Williams testified that it was possible for PNS to recover database information from the servers with IP addresses 207.158.164, 207.244.165, and/or 207.244.158.34 concerning 1) when information was imported by PNS for ConnectU from the Facebook website, and 2) when invitations were sent to Facebook users. Sutton Decl., Ex. F at 159:4-160:20 and 201:2-205:20; *see also* Id., Ex. G. None of this information has been produced or identified.

In addition to Mr. Williams' testimony, PNS' document production confirms that, even after this litigation commenced, PNS was in possession of information to enable Defendants to calculate the number of emails sent. Specifically, according to PNS' billing records for Mr. Williams, on or around January 12, 2006, Mr. Williams **Redacted** **Redacted** Id., Ex. H. Mr. Williams testified that this calculation could be repeated. Id., Ex. F at 157:19-158:19. He further testified that PNS logged **Redacted** Id. at 157:10-157:12. Mr. Williams also testified that PNS kept a record of **Redacted** None of this has been produced.

C. Meet And Confer Efforts

On July 16, 2007, counsel for the parties discussed ongoing discovery issues. During that conference, Plaintiffs pointed out that Mr. Williams' testimony indicated that:

> it is possible to determine the number of emails sent by ConnectU to students at California schools, as well as the number of imports and invitations sent. This information is available from the log files of the database maintained by PNS/ConnectU and should be produced, and should not be limited to California recipients. PNS also should be producing evidence of the number of emails it sent via Social Butterfly/importer, etc.

Sutton Decl., Ex. F at 156:17-158:15; 202:22-206:20 and ¶¶ 11 and 12.

Counsel for PNS responded:

> PNS has reviewed all of the locations it would have expected to find electronic files, and has produced everything to you.

Sutton Decl. at ¶13.

On September 12, 2007, Facebook sought confirmation from PNS and Mr. Williams that they would supplement their interrogatory responses, based on Mr. Williams' deposition testimony. Id. at ¶14. On September 14, 2007, Mr. Williams responded that he could provide no additional information because he no longer has access to the PNS servers, and PNS responded that it had performed a "detailed search." Id. at ¶15. Counsel for PNS indicated he would investigate further, and offered a declaration from Mr. Williams saying he could provide no additional information. Id.

On September 25, 2007, Facebook inquired into the status of PNS' promised investigation. Id. at ¶ 16. Facebook also asked when it could expect an answer as to whether PNS and Mr. Williams would supplement their interrogatory responses. Id. Counsel did not respond to this inquiry. Id. Instead, on October 4, 2007, Counsel for PNS wrote:

> Further to my statement that I would be following up with Mr. Taves, based on the testimony provided by Mr. Williams, Mr. Taves has located additional files that may concern ConnectU. We are in the process of investigating these files. Once we are able to open these files, if we find anything in them that is responsive to Plaintiffs' document requests we will produce it, assuming it is not otherwise privileged.

Id. at ¶17.

One week later, Facebook sought confirmation on when PNS thought this investigation could be complete and whether PNS and Mr. Williams would supplement their interrogatory responses. Id. at ¶18. As of the date of this filing, no response has been made. Id.

III. ARGUMENT

A. Facebook Is Entitled To Discovery Relating To Liability And Damages

1. Interrogatory No. 3 Seeks Information Relevant To Liability

Plaintiffs are entitled to discovery relevant to their claims, including those for violations of California's Penal Code, the Computer Fraud and Abuse Act and Federal CAN-SPAM Act. Interrogatory No. 3 seeks information from PNS and Mr. Williams that identified the URLs or IP addresses from which they accessed Facebook's servers, as well as the purpose for and dates of such access. *See* Sutton Decl., Exs. A and B at 6:1-5 . Liability accrues under the Computer Fraud and Abuse Act when a defendant accesses without permission, or exceeds authorized access, to a protected computer. *Brett Senior & Assocs., P.C. v. Fitzgerald*, 2007 U.S. Dist. LEXIS 50833 (E.D. Pa. July 13, 2007). For similar reasons, Defendants are liable under California Penal Code Section 502(c). Thus, PNS' and Mr. Williams' access to the servers is relevant to Plaintiffs' ability to establish liability. PNS refused to answer Interrogatory No. 3 altogether, suggesting instead that Plaintiffs obtain the information from Mr. Williams. Id., Ex. D at 5:24-6:3. Mr. Williams, on the other hand, provided IP addresses, but did not indicate the purpose for which he accessed the Facebook servers or when.[1] Id., Ex. E at 5:12-19. Mr. Williams may argue that because he does not have access to PNS' servers, he cannot provide a complete answer. In fact, Mr. Williams need not have access to PNS' equipment to provide the purpose for which he accessed the Facebook servers, as called for in this interrogatory. PNS has offered no legitimate reason for why it cannot fully respond to this interrogatory. The servers are within its possession, custody and control, and it was PNS that ConnectU hired to perform the work. If anyone should know what PNS equipment was used, why and when, it should be PNS.

[1] As the Court is aware, both Mr. Williams and PNS are represented by the same counsel, so it is disingenuous for PNS to point its finger at Williams who, in turn, provides an incomplete response. Both parties have equal access to the information. And, because the same attorney provided both responses, he certainly knew that when PNS responded it could not rely on Mr. Williams' response to be complete.

Both defendants' responses are incomplete and evasive, and they must be supplemented.

2. Interrogatory No. 4 Seeks Information Relevant To Damages

Interrogatory No. 4 seeks information related to Plaintiffs' damages pursuant to Defendants' violations of the Federal CAN-SPAM Act. Specifically, Interrogatory No. 4 seeks the identification of instances when PNS and Mr. Williams sent spam email to Facebook's users. Sutton Decl., Exs. A and B at 6:6-9. Plaintiffs are entitled "to recover damages in an amount equal to the greater of … actual monetary loss incurred by the [plaintiff] as a result of such violation" or statutory damages according to the scheme outlined in § 7706(g)(3). 15 U.S.C. § 7706(g)(1)(B). The "statutory damages" provision allows a party to recover $100.00 for each spam email sent in violation of Section 7704(a)(1) and $25.00 for each email sent in violation of any other provision of Section 7704. 15 U.S.C. § 7706(g)(3). As with its response to Interrogatory No. 3, PNS refused altogether to respond and, instead, suggested Plaintiffs seek the information from Mr. Williams. Id., Ex. D at 6:9-14. Mr. Williams, in turn, provided a generic explanation of how ConnectU's users could invite their friends to join the ConnectU website. Id., Ex. E at 5:24-6:8. He does not, however, provide any details of specific instances of email sent by Defendants, as called for in this interrogatory. Notably, Mr. Williams testified that the information sought by this interrogatory could be obtained, and PNS' billing records show that Mr. Williams had, in January 2006, calculated at least how many emails were distributed to California residents. Id., Exs. F at 157:19-158:19 and H. If PNS and/or Mr. Williams were capable of performing that calculation in January 2006, well after this lawsuit was initiated, they certainly should be able to provide that data now (or provide an explanation for why such information is no longer available).

An order compelling complete responses to Interrogatories Nos. 3 and 4 is warranted.

B. PNS Must Supplement Its Responses To Interrogatories Nos. 3 And 4 With All Information Available To It.

PNS' responses also are improper because it is required to provide all information available to it. Information "available to" PNS includes information within the personal knowledge of its employees and agents who were employed at the time the action was commenced, as well as current employees and agents who have responsive information. *FTC v. Braswell*, 2005 U.S. Dist. LEXIS 42817 at *11 (C.D. Cal. Sept. 26, 2005); *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1210 (8th Cir. 1973). Such information also includes nonprivileged information known to PNS' attorneys. Fed. R. Civ. P. 33(a). *See also, General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1210 (8th Cir. 1973); *Brunswick Corp. v. Suzuki Motor Co.*, 96 F.R.D. 684, 686 (E.D. Wis. 1983). Mr. Williams and Defendant Wayne Chang were both employed by PNS at the time this litigation commenced and, in fact, Mr. Chang is still employed by PNS. Of course, all three defendants are represented by the same attorney in this action.

1. PNS Has An Obligation To Seek Information Available To It

Mr. Williams, who by all accounts was the person responsible for developing the software applications used to facilitate the hacking and spamming of Facebook's servers, was employed by PNS at the time he developed those programs and when this litigation commenced. Sutton Decl., Ex. F at 28:20-29:2; 39:13-40:17. PNS' "belief," however, that "Williams may have information regarding th[ese] interrogator[ies]" does not end PNS' obligations to provide full and complete answers to them. *See Id.*, Ex. D at 6:13-14. Instead, PNS has an independent duty to obtain the information from Mr. Williams (and others) in order to adequately respond. *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1210 (8th Cir. 1973) (Information within the personal knowledge of former corporate employees employed at the time the action was commenced is deemed to be available to a responding corporate party). PNS is not permitted to avoid its discovery obligations by claiming that Mr. Williams is no longer in its employ or by pretending Mr. Williams will separately provide responsive information. *See International Asso. of Machinists, Dist. 169 v. Amana Refrigeration, Inc.*, 90 F.R.D. 1, 2 (E.D. Tenn. 1978).

Mr. Williams testified during his deposition that PNS stored the information sought by Interrogatory No. 4 and that such information could be recreated. Id., Ex. F at 157:19-158:19. PNS' billing records confirm that the information was available, at least in January 2006. Id., Ex. H. If PNS' position is that the person verifying its responses, *i.e.*, John Taves, does not have personal knowledge, PNS should (at minimum) be compelled to speak with Mr. Williams (and others) to determine where the responsive information is stored and how to collect and produce it. "In responding to an interrogatory a party cannot unreasonably limit his answer to matters within his own knowledge and ignore information immediately available to him or under his control." *Pilling v. General Motors Corp.*, 45 F.R.D. 366, 369 (D. Utah 1968). Defendants should not be permitted to play games with discovery, with one responding party saying the other should know while "the other" claims he does not have access to the data and thus cannot provide responsive information.

2. PNS Has An Obligation To Consult With Its Employees And Agents Who Have Relevant Information

These principles apply equally to information known to Defendant Chang. Mr. Chang also was intimately involved in the development and implementation of Social Butterfly and Importer, the programs designed to breach Facebook's security, steal data, and spam users. Mr. Chang works for PNS. PNS may argue that Mr. Chang was not its employee at the relevant times, but such an assertion is belied by documents created by Chang himself. Moreover, such an argument is unavailing, given Mr. Chang's current employment by PNS. *Pilling*, 45 F.R.D. at 369. PNS has a duty to consult with any of its employees, including Mr. Chang, who are in possession of the information sought to be discovered and then answer. *International Asso. of Machinists, Dist. 169 v. Amana Refrigeration, Inc.*, 90 F.R.D. 1, 2 (E.D. Tenn. 1978); *Continental Illinois Nat'l Bank & Trust Co. v. Caton*, 136 F.R.D. 682, 686 (D. Kan. 1991). There is no reason under the current circumstances that PNS should not be compelled to speak with its current employees, including Mr. Chang, to provide the most complete answer to these interrogatories.

C. Williams And PNS Assert Baseless Objections To Interrogatory Nos. 3 And 4.

Williams and PNS preface their responses to Interrogatories 3 and 4 with meritless and generic objections that should be overruled. Objections to interrogatories must clearly state the reason for the objection. *Brown v. Castillo*, 2006 U.S. Dist. LEXIS 34789, 3-4 (E.D. Cal. May 22, 2006); *see also*, Fed. R. Civ. P. 33(b)(1). In addition, the grounds for an objection to an interrogatory must be stated "with specificity." Fed. R. Civ. P. 33(b)(4); *Collins v. JC Penney Life Ins. Co.*, 2003 U.S. Dist. LEXIS 8455 (S.D. Cal. May 5, 2003) ("Bare assertions that the discovery requested is overly broad, burdensome, oppressive or irrelevant are ordinarily insufficient…"); *Nagele v. Electronic Data Sys. Corp.*, 193 F.R.D. 94, 109 (W.D.N.Y. 2000) (objection that interrogatories were "burdensome" overruled because objecting party failed to "particularize" basis for objection). Generic boilerplate objections without a response are rarely upheld. *Brown v. Castillo*, 2006 U.S. Dist. LEXIS 34789, 3-4 (E.D. Cal. May 22, 2006); *Paulsen v. Case Corp.*, 168 F.R.D. 285, 289 (C.D. Cal. 1996). Both Defendants object to Interrogatory Nos. 3 and 4 as "unintelligible," "assumes facts not in evidence" and "vague and uncertain." Sutton Decl., Exs. D at 5:24-6:14 and E at 5:12-6:8. However, neither defendant particularized the basis for its objections with the specificity required by Rule 33. Therefore, their objections should be overruled.

Defendants' objections on the ground that Interrogatory No. 3 "comprises at least three separate interrogatories" also is without merit. Sutton Decl., Exs. D at 5:25-26 and E at 5:13-14. The advisory comments to Fed. R. Civ. P. 33(a) specifically note, for instance, that "a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication." See Fed. R. Civ. P. 33(a) Advisory Note (1993). Moreover, where subparts are logical extensions of a basic interrogatory and seek specified additional information, or are "logically or factually subsumed within and necessarily related to the primary question," courts routinely hold that the use of such "sub-parts" does not transform the question into multiple interrogatories. *Safeco Ins. Co. of Am. v. Rawstron*, 181 F.R.D. 441, 445 (C.D. Cal. 1998) (quoting *Kendall v. GES Exposition Servs.*, 174 F.R.D. 684, 685 (D. Nev. 1997)); *Myers v. U.S. Paint Co., Div. of Grow Group, Inc.*, 116 F.R.D. 165, 165-166 (D. Mass. 1987). All of the information requested by Interrogatories Nos. 3 and 4 are logically and factually subsumed in the primary questions demanding that Defendants identify the addresses from which they accessed the Facebook servers (No. 3) and all instances on which they sent unsolicited emails to Facebook users (No. 4). To the extent Defendants are withholding any information based on these objections, their objections should be overruled and they should be compelled to supplement their answers.

IV. **CONCLUSION**

Facebook is entitled to an order in accordance with Rule 37 of the Federal Rules of Civil Procedure compelling Defendants Pacific Northwest Software and Winston Williams to provide responses without objection to Facebook, Inc.'s First Set of Interrogatories to Defendants Pacific Northwest Software and Winston Williams. To the extent that PNS and Mr. Williams refused to even answer Interrogatories Nos. 3 and 4, Facebook is entitled to an Order that such objections are overruled. In addition, PNS and Mr. Williams should be ordered to provide: (1) the exact URL and IP addresses from which any employee, agent or consultant of PNS accessed Facebook; (2) a statement of all the reasons for such access of the Facebook website; (3) the identity of the specific dates for such access; (4) the dates emails were distributed to Facebook's users; and (5) the California email accounts to which such emails were sent in order to completely respond to Interrogatories Nos. 3 and 4.

Dated: October 17, 2007

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Yvonne P. Greer /s/

Yvonne P. Greer
Attorneys for Plaintiffs
THE FACEBOOK, INC. and MARK ZUCKERBERG

CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on October 17, 2007.

Dated: October 17, 2007.

Respectfully submitted,

/s/ Yvonne P. Greer /s/
Yvonne P. Greer